No. 21210

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN E. LAWRENCE, CAROLEE LAWRENCE,

Appellants

v.

UNITED STATES OF AMERICA, UNITED STATES OF AMERICA, as Trustee, FLORA CRUZ, AUSTIN CRUZ,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

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I N D E X

CITATIONS

ases:

Cases cont'd: Page

Statutes, Rule and Regulation:

Miscellaneous:

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OPINION BELOW

The district court did not write an opinion. The minute order of April 4, 1966, and the judgment of dismissal appear at pages 93-95 of the record.

JURISDICTION

Appellants' amended complaint in the district court asserted jurisdiction on the basis of 25 U.S.C. secs. 349 and 415, 28 U.S.C. sec. 1331, 28 U.S.C. sec. 1346(b), and 28 U.S.C sec. 2410. The United States contended, inter alia, that no jurisdiction existed in the district court. The judgment of dismissal, entered April 13, 1966, did not specify the grounds upon which the case was dismissed (R. 94). Timely notice of appeal was filed on June 9, 1966 (R. 97). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the United States has consented to a quiet title action or a suit for specific performance where it holds lands in trust for Indian allottees.

2. Whether the allegation that employees of the Bureau of Indian Affairs negligently failed to issue a permit of occupancy to restricted Indian property states a claim upon which relief may be granted under the Federal Tort Claims Act.

3. Whether a contract touching restricted Indian trust property is absolutely null and void under 25 U.S.C. sec. 348

4. Whether the California statute of limitations would r this action in any case.

STATUTES INVOLVED

The Federal Tort Claims Act, 62 Stat. 933, as amended, U.S.C. sec. 1346(b), reads:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Exceptions to the Federal Tort Claims Act, 62 Stat. 4, as amended, 28 U.S.C. sec. 2680, read in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The Act of June 25, 1948, 62 Stat. 972, as amended, 28 U.S.C. sec. 2410, as here applicable,[1/] reads:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

The Act of February 8, 1887, 24 Stat. 389, as amended 25 U.S.C. sec. 348, reads in pertinent part:

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

Pertinent sections of the California Code of Civil Procedure read as follows:

> Sec. 335.
>
> PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

1/ An amended form of this statute became law on November 2, 1966, Pub. L. 89-719, Title II; even if it had been earlie enacted it would not be applicable in this case.

Sec. 339.

Within two years. 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

STATEMENT

On December 1, 1955, Flora A. Cruz (one of the defendant-appellees in this case), a member of the Agua Caliente Band of Mission Indians, entered into a five-year lease with Carl King and Lulu King. The subject of the lease was a certain parcel of real property located on Highway 111 in the County of Riverside, Cathedral City, California (R. 3). This land was held in trust by the United States and allotted to the aforementioned Flora Cruz. This lease was subsequently approved by the Bureau of Indian Affairs (R. 52).

During the years 1956 and 1957, with the major portion of the lease to run, the Kings made certain improvements on the land. When this lease had expired in 1960, Mr. and Mrs Cruz refused to renew a lease of that length or enter into a longer one (Tr. 16).[2/] After negotiation, a permit to occupy the land was issued to the Kings on a yearly basis (Tr. 15). This permit was subsequently renewed on this basis (Tr. 25), and on May 1, 1964, Carl and Lulu King transferred their interest in the subject property to the appellants, Edwin E. and Carolee Lawrence, who apparently occupied the property on this same permit basis in subsequent years.

On September 17, 1965, appellants brought suit against Flora and Austin Cruz and the United States as trustee (R. 2). The complaint alleged an oral contract which was said to have arisen from an unwitnessed conversation between Carl King and Austin Cruz sometime in November 1956 (Tr. 6-9). Appellants sought specific performance plus $100,000 damages or in the alternative, $1,000,000 damages. Appellees filed separate motions to dismiss (R. 5,21), which were granted subject

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2/ Their references are to the deposition of Carl M. King.

ppellants' leave to file an amended complaint. Such amended omplaint was filed on March 1, 1966 (R. 44). It was essen- ially the same as the original complaint, except for the dded allegation that employees of the Bureau of Indian Affairs ad negligently failed to execute a permit regarding occupancy f a separate parcel of land (R. 47) allegedly leased [3/] to ap- ellants' donors (the Kings). The relief sought in this in- tance was the same as stated above, but included a prayer for 10,000 damages against the United States, arising from the al- eged negligence of employees of the Bureau of Indian Affairs, nd further sought to quiet title in the property involved on he basis of 28 U.S.C. sec. 2410 (R. 48).

Appellees once again filed motions to dismiss which ere based, inter alia, upon lack of jurisdiction (R. 65, 56). ppellants filed opposition to these motions (R. 83, 87), and he matter was heard on April 4, 1966. Thereafter, on April 3, 1966, the district court entered judgment granting the ap- ellees' motion and dismissing the cause with prejudice. Costs

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/ The amended complaint contains no allegation as to how or upon what date this lease was to have come into existence.

were assessed against appellants (R. 94-95). This appeal followed.

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction of appellants' specific performance suit because of the doctrine of sovereign immunity. This Court has been explicit in refusing to allow specific performance against the United States, and sovereign immunity applies with the same force to lands held in trust for Indians by the United States.

28 U.S.C. sec. 2410, allowing suit by a person claiming an interest in real property on which the United States holds a lien, is inapplicable here because the United States has complete title to Indian trust properties. This statute is a limited waiver of sovereign immunity and in this instance neither the United States nor appellants come within its term

2. Appellants emphasize the entirely separate nature of their tort action. Taken alone, this negligence suit fails to state a claim upon which relief can be granted, in t it alleges no duty owed to appellants by appellees. Furtherm the issuance of a permit to occupy allotted Indian land is an tivity completely committed to the discretion of the Departme

f the Interior and, thus, the activity complained of herein learly falls within the "discretionary exception" to the Federal Tort Claims Act, 28 U.S.C. sec. 2680.

3. Furthermore, this suit is founded on a contract which s absolutely null and void ab initio unless approved by the ecretary of the Interior. Appellants' contentions that such contract is actionable without the Secretary's approval flies n the face of the clear mandate of 25 U.S.C. sec. 348 and goes gainst a consistent line of authority existent from the very eginnings of the Indian allotment system.

4. Finally, the record in this case illustrates on its ace that this action is barred by the California statute of imitations.

ARGUMENT

I

THE COURT HAD NO JURISDICTION OF A CLAIM FOR SPECIFIC PERFORMANCE

Essentially appellants' claim is one for specific performance of an alleged oral contract to lease the property to ppellants' predecessors. In White v. Administrator of General ervices Admin. of U.S., 343 F.2d 444 (1965), this Court noted

at page 446:

> From the beginning of its history, the United States asserted and maintained complete immunity from suit until Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

The same sovereign immunity applies to lands held i trust by the United States as to lands **in** which it has a bene ficial interest. Minnesota v. United States, 305 U.S. 382 (1939). The litigation concerning the Palm Springs allotment (of which Arenas v. Preston, 181 F.2d 62 (C.A. 9, 1950), reli on by appellants (Br. 10-11), was one) was a series of cases based upon the consent to suit contained in 25 U.S.C. sec. 3 and has no bearing on this case.

The consent to suit in 28 U.S.C. sec. 2410 likewis has no bearing here. That statute applies only when the Uni

States claims a lien upon property. Wells v. Long, 162 F.2d 842 (C.A. 9, 1947), sustained the dismissal for lack of jurisdiction of a suit seeking specific performance of land to which the United States held title, rejecting attempted invocation of Section 2410. Accord, Shaw v. Rippel, 224 F.Supp. 77 (E.D. Ill. 1963). That decision, we submit, controls this case. And see fn. 11 of United States v. Brosnan, 363 U.S. 237, 247-249 (1960), setting forth the legislative history of Section 2410. The dismissal of the claim for specific performance was thus clearly correct.

II

THE COURT HAD NO JURISDICTION OF A CLAIM FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

The amended complaint asserted a claim under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b). These tort allegations are admittedly related to an entirely separate and distinct parcel and alleged transaction from the one upon which the original complaint was based (Br. 9, 10). 4/

4/ Appellants concede that this mode of pleading could be attacked on grounds of misjoinder (Br. 10). More noteworthy is the fact that, although appellants' original complaint was dismissed with leave to amend, appellants did not amend but chose to include this additional "separate and distinct action" (Br. 10). Since the court presented no grounds for its dismissal, the question is raised whether, in dismissing the suit in this regard, the judge was exercising his sound discretion on the basis that appellants had failed to comply with his original order. See Kirsch v. Barnes, 157 F.Supp. 671, 672 (N.D. Cal. 1957), aff'd 263 F.2d 692 (C.A. 9, 1959).

Basic to any claim of negligence is the existence o a duty owed to the claimant. Taken alone, appellants' tort a legations (R. 47, pars. 14-17) are defective in that they sho no duty owed to the appellants by the appellees. Appellants make no showing that they had a right to the issuance of a pe mit. In fact, the complaint contains no allegation that any application for a permit to this separate parcel of property was ever filed. How, indeed could employees of the Bureau of Indian Affairs be negligent in failing to issue such an unso- licited permit?

Moreover, any occupancy permit must be based upon a right to occupancy arising from a lease or other authority. While appellants allege execution of a lease without further specification (R. 45), there is not even an allegation of de mental approval of any lease as required for restricted prop- erty. Even if application had been made, based on an approv lease, the issuance of such a permit by the Bureau of Indian Affairs is a purely discretionary activity. The Federal Tor Claims Act was not intended to be used to review the discret

f the Secretary of the Interior. 5/

The action of the Bureau of Indian Affairs in issuing ermits to allotted Indian lands was purely discretionary. The nited States, by virtue of its status of guardian for Indian llottees, is responsible for the protection of these Indians s long as they remain wards of the Government. Armstrong v. nited States, 306 F.2d 520 (C.A. 10, 1962). The purpose of he trust patent for an Indian allotment was to prevent the al- ottee from improvidently encumbering or alienating his land. klahoma v. Texas, 258 U.S. 574, 597 (1922). Thus, Congress as charged the Secretary with the duty of protecting the in- erests of the Indians in their allotted lands. To this end, 5 U.S.C. secs. 348, 392 and 415 provide that any contract ouching these lands, which is not approved by the Secretary, s absolutely null and void for all purposes. United States

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5/ See Coates v. United States, 181 F.2d 816, 818 (C.A. 8, 1950), where the court quotes the Memorandum for the Judiciary Committee printed with the Hearings on the changes ade in H.R. 5373 by H.R. 6463, 77th Cong.,2d Sess., dated anuary 29, 1942 (p. 44):

> "It is neither desirable nor intended that the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act, be tested through the medium of a damage suit for tort."

v. Emmons, 351 F.2d 603 (C.A. 9, 1965).

And there can be no doubt that the issuance of permi falls within the purview of the Secretary's discretion. The a plicable regulation, 25 C.F.R. sec. 131.1, defines these permi as follows:

> (e) "Permit" means a privilege revocable at will in the discretion of the Secretary and not assignable, to enter on and use a specified tract of land for a specified purpose. The terms "lease", "lessor", and "lessee", when used in this part include, when applicable, "permit", "permitter", and "permittee", respectively. 6/

Likewise, the statutory authorization for the issua of these permits is also clearly discretionary. 25 U.S.C. se 415 says that these restricted Indian lands may be leased "wi the approval of the Secretary of the Interior." 7/ Approval n essarily requires judgment and an exercise of the Secretary's discretion. Thus, the failure to issue the permit complained

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6/ Beside being revocable at will, permits are not assignabl and, thus, the appellants here, the assignees, are not th proper parties-plaintiff, even if any duty had existed.

7/ The above definition of a permit symbolizes a tenancy at will and is authorized by the statute authorizing leases.

here clearly comes within the exception to the Federal Tort laims Act found at 28 U.S.C. sec. 2680(a), which reads:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

ecoming more particular, an analogous situation was presented the Tenth Circuit in Chournos v. United States, 193 F.2d 21, (C.A. 10, 1952), cert. den., 343 U.S. 977. There the ourt held that a suit based upon failure to issue a grazing ermit came within the exception of 28 U.S.C. sec. 2680(a) of he Federal Tort Claims Act, stating (pp. 323-324):

> It seems clear to us that the granting or rejection of the applications here was within the discretionary function of the range officials as contemplated by Sec. 2680(a) of the Federal Tort Claims Act. Sickman v. United States, 7 Cir., 184 F.2d 616, certiorari denied 341 U.S. 939, 71 S.Ct. 999, 95 L.Ed. 1366; Coates v. United States, 8 Cir., 181 F.2d 816, 199 A.L.R.2d 840; Cromelin v. United States, 5 Cir., 177 F.2d 275, certiorari denied 339 U.S. 944, 70 S.Ct. 790, 94 L.Ed. 1359; Kendrick v. United States, D.C. N.D. Ala., 82 F.Supp. 430.

The lack of jurisdiction of the asserted tort claim is, we sub mit, clear.

III

THE ALLEGED BASIS FOR THE SUIT FOR SPECIFIC PERFORMANCE IS A CONTRACT TOUCHING ALLOTTED INDIAN LANDS AND ABSOLUTELY NULL AND VOID

In this respect it is noted that appellants' complaint alleges a contract to be approved by the Secretary of the Interior (R. 46) and nowhere alleges that approval did in fact occur. Concerning such contracts, 25 U.S.C. sec. 348, which governs these allotted Indian lands, provides a clear mandate.

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

Moreover, there exists a wealth of authority, datin from the early years of the allotment system to the present, giving effect to this clear mandate. United States v. Ricker, 188 U.S. 432 (1903); Sage v. Hampe, 235 U.S. 99 (1914); United States v. Hellard, 322 U.S. 363, reh. den., 323 U.S. 811 (194 United States v. Emmons, 351 F.2d 603 (1965).

IV

THIS CONTRACT ACTION WOULD BE BARRED BY THE CALIFORNIA STATUTE OF LIMITATIONS

This argument is treated summarily in the light of he clear mandate of Congress making such contracts null and oid, supra. However, California law would apply to a con- ract of this nature, could such be valid Guaranty Trust Co. . York, 326 U.S. 99 (1945). Thus, Section 339 of the Cal- fornia Code of Civil Procedure, would apply, requiring the ommencement of an action founded upon a contract not in riting within two years from the date the cause of action ccrues.

The deposition of Carl M. King (hereafter referred o as "Tr.") purports the alleged contracts to have taken lace in November 1956 (Tr. 5-6). Appellants did not file heir original complaint until September 17, 1965 (R. 2). his is a period of nine years and eight months. Appellants rgue that no refusal to perform on the part of the Cruzes ook place before June 6, 1965, and thus no cause of action rose until that date (Br. 18). We submit, however, that the ecord before this Court indicates the contrary.

In speaking of an attempted transfer of his inter

in this alleged lease to Merritt Trailer Sales in 1961 (Tr.

Carl King, an interested party, stated as follows (Tr. 21):

> MR. KING: A Well, I wanted to transfer the offer to Merritt Trailer Sales.
>
> MR. LAWRENCE: Q What did he [Austin Cruz] say?
>
> A He didn't say he wouldn't. He just didn't do it. He wouldn't do it. He didn't refuse to do it. That is, he didn't tell me, "I won't do it." He just wouldn't transfer it.

Also, a year previously, Mr. King was notified th

no lease would be executed (Tr. 24-25):

> MR. LAWRENCE: Q Mr. King, did you testify that in 1960, you were advised by Mr. Cruz that your five year lease would not be extended and that you would not be given a long term lease?
>
> MR. KING: A That's right. He [Austin Cruz] come out to the park and told me that, he and Mrs. Seva [Flora Cruz] both.

Since Rule 9(f) of the Federal Rules of Civil Pr

cedure makes averments of time material in testing the suf

ficiency of a complaint, this action is barred by the stat

of limitations.

Thus, in the light of this, plus the statute of frauds
sue that is raised by the lack of any memorandum, it appears
e district court could properly have dismissed the complaint
rely on the grounds of local law. 8/

CONCLUSION

For the foregoing reasons, we respectfully submit that
e dismissal of this case should be affirmed.

Respectfully submitted,

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It is understood that counsel for Mr. and Mrs. Cruz will brief arguments on the California statute of frauds and atute of limitations in greater depth. Because of this ct and what is felt to be the persuasiveness of the federal sues dealt with supra, only the above is noted.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

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